UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UTILITY WORKERS UNITED ASSOCIATION, LOCAL 537
Respondent

and Case 06-CB-235968

PENNSYLVANIA AMERICAN WATER COMPANY
Employer/Charging Party

EMPLOYER'S REPLY TO RESPONDENT'S BRIEF
ON EMPLOYER'S & GENERAL COUNSEL'S SUMMARY JUDGMENT MOTION

The Employer's and General Counsel's pending Summary Judgment Motions maintain that, under well-established NLRB precedent from the last thirty-seven years, the Respondent union unlawfully refused the Employer's demand to negotiate new CBAs when the Respondent became the new bargaining representative following NLRB elections and certifications in the two applicable bargaining units. Respondent argues that the precedent cited by the Employer and General Counsel does not warrant summary judgment.

It is undisputed that, in the two units at issue, the NLRB issued Directions of Elections finding questions concerning representation existed which resulted in elections and the certification of Respondent in December 2018 as a new bargaining representative.

A. The Association's Citations Either Pre-date the Consistent Precedent of the Last Nearly Forty Years or Concern Readily Distinguishable Situations.

1. Many of the Respondent Union's Citations are Too Old to be Usable.

The Respondent's Brief cites six NLRB decisions from the 1950s, some only on ancillary points and the others predating the cases cited by the Employer and General Counsel. The more recent decisions upon which the pending Motions are based provide more specific and clear

rules, all holding that a NLRB certification change operates to void and nullify the previously certified union's CBA. *See Children's Hospital of Oakland*, 364 NLRB No. 114 at p. 6 (2016); *More Truck Lines*, 336 NLRB 772, 773 (2001), *enf'd.* 324 F.3d 735 (D.C. Cir. 2003); *Wayne County Neighborhood Legal Services, Inc.*, 333 NLRB 146, 148 n. 10 (2001); *RCA Del Caribe, Inc.*, 262 NLRB 963, 966 (1982). Plainly, Respondent's earlier cited decisions do not undo the more recent, consistent and clear governing precedent.

2. Most of Respondent's Cases Do Not Concern a Certification Change.

Respondent's Brief's more recent citations are readily distinguishable as involving different circumstances. Generally, Respondent's cases did not involve the key distinguishing, undisputed feature of the present case—a NLRB election resulting in a certification change. For example, *Mulvaney Mech., Inc. v. Sheet Metal Wrkrs. Un.*, 288 F.3d 491 (2d Cir. 2002), cited at pages 6-7 of Respondent's Brief, concerned the wholly different situation of an employer claiming a union's strike in violation of a CBA's no-strike clause operated to repudiate that CBA so as to relieve the employer of its obligation under that contract to arbitrate grievances. That Second Circuit case is hardly precedent upon which to sidestep the last thirty-seven years of the NLRB's consistent and subsequently continuing precedent that a certification change voids the CBA with the previously certified union and requires bargaining a first CBA between the new parties.

Respondent also does not reveal that the *Mulvaney* decision it cited was vacated by the U.S. Supreme Court. *Mulvaney Mech., Inc. v. Sheet Metal Wrkrs. Un.*, 538 U.S. 918 (2003). Respondent cited the earlier *Mulvaney* decision for its support of the older decision in *Abrams v. Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); but, on remand the Second Circuit's decision does not mention *Abrams*. *Mulvaney Mech., Inc. v. Sheet Metal Workers Un.*, 351 F.3d 43 (2d Cir.

2003). Further, *Abrams*, which did involve an election certification change, relied on the 1953 NLRB decision in *American Seating*, 106 NLRB 250 (1953) (see Respondent's Brief, at pp. 6-7). *American Seating* (which did not provide a clear rule for the present situation) and *Abrams* arose before the 1982 to 2016 decisions in *Del Caribe*, *More Truck Lines*, *Wayne County,* and *Children's Hospital of Oakland*, which consistently made it clear that a certification change renders the prior union's CBA null and void.

Also, other cases relied upon by Respondent did not involve a certification change, such as: *Tile, Marble, Terrazzo ... and Granite Cutters International Union AFL-CIO, et al. v. Tile, Marble, Terrazzo ... and Finishers Local 32 et al.*, 896 F.2d 1404 (3d Cir. 1990) (Respondent's Brief, at p. 9), *Royal Laundry*, 20-RM-2868 (NLRB Reg. 20, 2009) (Respondent's Brief, at p. 9), *NLRB v. Hershey* Chocolate, 297 F.2d 286 (3d Cir. 1961) (Respondent's Brief, at p. 9) or *Kravis Center*, 351 NLRB 143 (2007) (Respondent's Brief, at p. 13).[1] The absence from these cases of the key and determinative legal action here—a NLRB certification change—renders these decisions inapplicable and unpersuasive.

B. Respondent's Brief Mischaracterizes the Law.

1. Respondent Conflates the Statutory Status Quo Maintenance Obligation with the Existence of a Contract.

Respondent attempts to rely on an employer's obligation to maintain the status quo to support its argument that a prior union's contract continues in effect after a certification change; however, these are mutually exclusive concepts. Specifically, Respondent argues that *More*

[1] For example, the 1961 decision in *Hershey Chocolate* dealt with a now superseded method of assessing when an affiliation change occurs that does not raise a question concerning representation. It also involved a situation where the employer and the most recent union agreed upon CBA terms (rather than the present case in which the union refuses to bargain for a first contract). These points distinguish it from and render it inapplicable to the present case.

Truck Lines provides a newly certified union with the option to adopt or reject a previously certified union's CBA (Respondent's Brief, at page 8). But, the language quoted by Respondent does not address the effect of a CBA after a certification change, but rather addresses the now well-established rule that an employer bargaining for a contract must maintain the status quo prior to reaching agreement or impasse.[2] *See e.g., More Truck Lines*, 336 NLRB at 772 & 775. Indeed, the *More Truck Lines* decision further states the following:

> But the Board in *RCA Del Caribe* meant for its decision to be a means to preserve the status quo, and to decrease the advantages that one labor organization may have over another. *RCA Del Caribe*, *supra*, at 965. ... **[T]he law is clear that during negotiations for a new collective bargaining, the working conditions of the employees continue until impasse or until there is a new agreement.** The employer can make no unilateral changes in terms and conditions of employment during the bargaining process. *NLRB v. Katz*, 369 U.S. 736 (1962). "Good faith compliance with Section 8(a)(1) of the Act demands that an employer not change any 'conditions of employment' until the employer has consulted the chosen bargaining agent and given them the opportunity to negotiate any changes." *Armstrong Cork Co. v. NLRB*, 211 F.2d 843, 847 (5th Cir. 1954) (citing *NLRB v. Crompton-Highland Mills*, 337 U.S. 217, 224 (1949); and *May Department Store Co. v. NLRB*, 326 U.S. 376, 383-385 (1945)).
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> Continuing the conditions of employment includes continuing promised wage increases. *McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391 (1998).

More Truck Lines, 336 NLRB at 775 (emphasis added). The status quo maintenance is a statutory not a contractual obligation. *NLRB v. Katz*, 369 U.S. 736 (1962); *Cofire Paving Corp.*, 359 NLRB 180, 183-84 (2012) ("The existing terms and conditions continue in effect by operation of the [National Labor Relations] Act; they are no longer contractual terms ...."); *More Truck Lines*, 336 NLRB at 773. Hence, it is improper for Respondent to use the status quo duty

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[2] What is meant by the language Respondent quotes from *More Truck Lines*, at page 8 of Respondent's Brief, is that, following a change in certification, while bargaining for a first CBA with a new union, an employer must maintain the status quo and cannot, without bargaining, impose different terms such as those in place before the prior union's last CBA. This does not mean the prior, decertified union's CBA remains in effect as a contract. Rather, the terms and conditions of employment existing at the time of the certification change, which of course include the prior union's last CBA, i.e., the status quo, must be continued to maintain a level playing field while bargaining.

to imply the existence of a contract. Indeed, the opposite is always the case. During the time the employer is statutorily required to maintain the status quo, there can be no contract in effect.

2. Respondent Improperly Claims Compliance with One Area of Labor Law Constitutes Waiver of Another.

Respondent argues the Employer waived its position that no contract is in effect when it recently followed the terms of the prior decertified union's CBA (Respondent's Brief, at pages 11-12). Although Respondent does not indicate specifically the employer action, the Employer did comply with its status quo obligation to provide periodic wage increases in November 2019 for the Outside Districts unit. Indeed, *More Truck Lines* specifically requires an employer in the circumstances present here, to maintain its periodic wage increases after a certification change, pending completion of bargaining for a first labor contract with the newly certified union. 366 NLRB at 772-775. Despite Respondent's argument to the contrary, the Employer should not be punished and restricted from exercising its lawful right to bargain a new contract with a new union merely because it complied with its lawful duty to maintain the status quo.

3. Respondent Improperly Claims a New Union Lacks a Bargaining Duty.

Respondent argues that the decisions cited by the Employer and General Counsel, such as *More Truck Lines* and *Children's Hospital of Oakland* do not apply to Respondent because they were cases where the employer, rather than the union, tried to avoid its bargaining obligation (Respondent's Brief, at pages 7-8). This is a distinction without a legal difference. The National Labor Relations Act requires both unions and employers to bargain in good faith for a labor contract. NLRA § 8(d), 29 U.S.C. § 158(d); *NLRB v. American Nat'l Insurance Co.*, 343 US 395, 402 (1952). This mutual, mirror bargaining duty does not provide a basis to say it only applies in one direction. The decisions speak in broad terms that apply regardless of which side

brings the claim. The decisions clearly state that, upon an election decertifying one union and certifying another, the prior union's CBA is no longer in effect. *Children's Hospital of Oakland*, 364 NLRB No. 114, at p. 6 (2016) ("Once employees replace one union with another, any existing collective-bargaining agreement is no longer in effect"); *More Truck Lines*, 336 NLRB 772, 773 (2001), *enf'd.* 324 F.3d 735 (D.C. Cir. 2003) ("Thus, if a challenging union is certified, then the contract between the employer and the incumbent becomes void"); *RCA Del Caribe, Inc.*, 262 NLRB 963, 966 (1982) ("If the challenging union prevails [in the NLRB election] ... any contract executed with the incumbent [union] will be null and void."); *Wayne County Neighborhood Legal Services, Inc.*, 333 NLRB 146, 148 n. 10 (2001). The mutual obligation to bargain means that each party to a new bargaining relationship arising as a result of a NLRB certification change must bargain towards a first labor contract, which Respondent refused to do. It was the certification change, not any difference in the duty to bargain, that cancelled the prior incumbent union's CBA and required bargaining for a first contract.

C. Respondent's Claim of an Affiliation Change is Too Late and Doesn't Change the Results.

1. Respondent's Claim Now that it went through a Minor Affiliation Change Not Involving a Question Concerning Representation Does Not Undo the Fact that NLRB Elections Occurred.

Respondent's Brief discusses what constitutes a minor change in affiliation by which a modified union maintains substantial continuity with the prior union to not raise a question of representation, thereby allowing it to step into the prior union's shoes and continue rather than void its labor contract (Respondent's Brief, at pages 8-11). That ship has sailed. Election petitions were filed in 2018 and the Respondent supported them. *See* NLRB cases 6-RC-218527 and 6-RC-218209 (Pittsburgh and Outside Districts bargaining units, respectively), which

culminated in the Directions of Elections that describe the parties' positions—copies of these are in Exhibits 1 and 2 to Employer's Summary Judgment Motion. As the Regional Director properly concluded in the Directions of Election, the question of "whether the [Respondent/]Petitioner's disaffiliation was effective … has no impact on the question concerning representation raised here." *See* Exhibits 1 and 2 to Employer's Summary Judgment Motion, at pages 7 and 8, respectively.

Also, the Respondent could have petitioned for amended certifications but did not. *See,* 29 C.F.R. §§ 102.60(b), 102.61(e); *NLRB v. Financial Institution Employees of America, Local 1182 (Seattle-First)*, 475 U.S. 192, 198-201, 203 (1986).[3] To obtain an amendment/revision to a prior NLRB certification, the union must demonstrate that there is not a question concerning representation but rather a substantial continuity between the prior and petitioning union. *Seattle-First*, 476 U.S. at 200, 206. The NLRB's regulation on a petition for an amended certification requires "the absence of a question of representation." 29 C.F.R. §§ 102.60(b). Thus, in a successful NLRB petition to amend, the NLRB does not conduct an election as there is no question of representation.[4] Respondent did not to do this, and instead supported election

[3] The details of *Seattle-First* concerned an issue not involved here, namely due process rights in an affiliation change of employees who are not members of the union; but the decision described the availability of a petition to amend a certification as a means of avoiding an election.

[4] Such an affiliation change involves a determination that an existing union representative has undergone a relatively minor change in identity so as to maintain substantial continuity with the pre-existing union representative. *Seattle-First*, 475 U.S. at 198-201, 203. The *Royal Laundry* decision cited by Respondent (Respondent's Brief, at p. 9) and the citations therein also show that where there is an affiliation change there is no NLRB election and the new union is a successor to the prior union (and its labor contract). By contrast, a certification change follows a finding of a question concerning representation, which results in a NLRB election (*see e.g.*, *Royal Laundry*, at pp. 1, 4-5; *NLRB v. Bernard Gloekler N. E. Co.*, 540 F.2d 197 (3d Cir. 1976)); and if the new union is certified then the previously certified union's CBA is void. *See e.g., More Truck Lines*. A finding by the NLRB that a question concerning representation exists is incompatible with the affiliation change Respondent now seeks.

petitions. *See* Exhibits 1 and 2 to the Employer's Summary Judgment Motion.[5] Regardless of its reasons, Respondent must accept the applicable legal consequences of the NLRB elections.

The Directions of Election specifically included, as they must, a finding that "[h]ere, a question concerning representation exists," which resulted in the elections (Exhibits 1 and 2, both at page 8). Respondent cannot now act as if a question concerning representation did not arise and the resulting election did not occur. An election (triggered by a question concerning representation) results in the legal rules and consequences associated with it, including the established precedent that a certification change voids the prior union's CBAs.

2. The NLRB Has Already Addressed and Rejected Respondent's Claim of Substantial Continuity of Representative.

The NLRB already has rejected in other charges the Respondent's claim that it is not a new union, but rather a substantial continuation of the prior incumbent union. Respondent filed charges against the Employer (6-CA-239135 & 5-CA239176) alleging that the prior union's CBAs continued in effect and required the Employer to continue dues checkoff under those prior CBAs. The Region, and on review, soundly rejected those claims:

> Although the Union represents the same employees as the prior union, the new Union is a completely new labor organization, bargaining towards a first contract. In this circumstance, the Board cannot require an employer to deduct union dues from employees' paychecks without a collective bargaining agreement in place requiring the Employer to do so.

See Exhibit 6 to Employer's Summary Judgment Motion, at paragraph 2.

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[5] Respondent argues, at pp. 12-13 of its Brief, that the filing or withdraw of the trusteeship litigation between the prior local union and national union warrants ignoring the NLRB's actions. Absent a specific order from a court of appeals so saying, which is not the case here, there is no basis for saying that either the filing or withdraw of a lawsuit in federal district court changes the impact of the NLRB's elections and certifications.

Conclusion

The legal principles and proceedings to date make it clear that the Respondent Union underwent a NLRB election certification change that voided the labor contracts in effect with the prior incumbent union. The fact that the Respondent Union may regret its choices or strategy and, for whatever reason, desires to avoid bargaining is no legal basis for acting as if the prior NLRB proceedings and clear legal precedent do not exist.

The Employer is entitled to a ruling that the law on certification changes applies and does not permit the Union to continue to avoid the Employer's desire and right to negotiate a first labor contract. The Employer's and General Counsel's Motions for summary judgment should be granted.

Respectfully submitted,

Craig M. Brooks, Esquire
PA. I.D. No. 33513
Houston Harbaugh, P.C.
401 Liberty Avenue, 22nd Floor
Three Gateway Center
Pittsburgh, PA 15222
(412) 281-5060
Counsel for Employer,
Pennsylvania American Water Company

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Employer's Reply to Respondent's Brief on Employer's & General Counsel's Summary Judgment Motion* was served via electronic mail this 18th day of December 2019 upon the following:

Samuel J. Pasquarelli, Esq.
Sherrard, German & Kelly, P.C.
535 Smithfield Street, Suite 300
Pittsburgh, PA 15222-2319
Counsel for Respondent

Nancy Wilson, Regional Director
Zachary A. Hebert, Esq.
National Labor Relations Board, Region 6
1000 Liberty Ave., Room 904
Pittsburgh, PA 15222-4111
Counsel for NLRB General Counsel

Craig M. Brooks